IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

MONDAY, THE 9TH OCTOBER 2006 / 17TH ASWINA 1928

CRL.A.No. 1024 of 2001()

CC.276/2000 of JUDL.MAGISTRATE OF FIRST CLASS-II, MANANTHAVADY

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APPELLANT:

K.V.MATHEW, KANDATHUKUDY,
PERUVAKA,
MANANTHAVADY.

BY ADV. SRI.GEORGE VARGHESE (MANACHIRACKEL)

RESPONDENTS:

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1. M.K.RAGHAVAN,
CONTRACTOR,
MUTHIRAKALAYIL HOUSE,
'B' STREET, MANANTHAVADY.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. SRI.K.P.DANDAPANI
PUBLIC PROSECUTOR, SRI.K.S.SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M.JAMES, J.

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Crl.A. No. 1024 of 2001(A)

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Dated this the 9th day of October, 2006

J U D G M E N T

The complainant in C.C.No.276/2000 on the file of Judicial Magistrate of the First Class-II, Mananthavady, is the appellant. The complainant preferred a complaint under Section 138 of the Negotiable Instruments Act, in short 'the Act', against the first respondent, as an amount of Rs.75,000/- was due to the complainant, because of the dishonour of Exhibit P1 cheque, issued by the first respondent-accused. Despite the issuance of Exhibit P3 notice, the amount was not paid, although, the first respondent had issued Exhibit P4 reply notice.

2. To prove the case, the complainant examined two witnesses and marked 7 documents. The first respondent examined three witnesses, including himself.

3. The trial court had framed five points, viz.:-

i. Whether the cheque is duly executed by the accused?

ii. Is the cheque issued for consideration?

iii. Is the cheque issued as an absolute payment?

iv. Whether the accused had committed any offence u/s.138 of the N.I.Act?

v. Finding on sentence, if any?

4. After discussing the evidence, the learned Magistrate found point Nos. i and ii, in favour of the complainant-appellant. But, found point Nos. iii and iv, against him. Therefore, the accused was acquitted. Hence, this appeal.

5. Discussing point No. iii, the learned Magistrate relied on Sections 5 and 6 of the Act, and found that Exhibit P1 cheque, should be 'unconditional'. The learned Magistrate also relied on Sections 32 and 45 of the Indian Sale of Goods Act, to hold that the payment of goods and delivery should be concurrent, and the cheque, issued and received by the seller, as conditional payment, should come within the definition of an unpaid seller. Further, conclusion was that the burden of proof that Exhibit P1 cheque was issued as unconditional or absolute payment, is with the unpaid seller as otherwise it should be presumed that the cheque is conditional one.

6. Sections 5 and 6 of the Act, have been placed before me and argued to show that, to attract the ingredients of

a cheque, as contemplated under Section 6 of the Act, the cheque should be in writing containing an unconditional order, signed by the maker, in this case, the accused, the first respondent. In **I.C.D.S Ltd. vs. Beena Shabeer** [2002(3) KLT 218 (SC)], the Apex Court had an occasion to consider the applications of the provisions of the Indian Contract Act, vis-a-vis, the Act. The Apex Court said at paragraph 12 as follows:-

> "12. It is to be noted, however, that both the parties during the course of arguments have made elaborate submissions on Ss.126 and 128 of the Contract Act, but in our view, by reason of the specific language used by the Legislature, question of consideration of the matter from the point of view of another statute would not arise, neither we would like to express any view since that may have some effect as regards the merits."

7. There is no satisfactory material before me to show that Exhibit P1 cheque was issued by the accused to the appellant-complainant to be presented or to be used on fulfillment of any condition that has been offered or accepted by either of the parties. When a cheque is issued, duly signed and, even if, the particulars are filled up, by the holder of the cheque in due course, the same come within the scope of Section 138 of the Act. Whether the cheque was issued for discharge of a legal

debt or liability, that is due to the holder of the cheque, is a fact that should be disproved or rebutted, by adducing evidence by the drawer of the cheque, when the holder of the cheque prima facie establish the same. The evidence available on record also do not show any condition on which the appellant, could present Exhibit P1 cheque for clearance, so that the amount stated therein, could be received by the appellant.

8. In the above fact situation, I am of the opinion that Exhibit P1 cheque was issued unconditionally, and there is no evidence to prove otherwise, as laid down by the Apex Court. There is no need to consider the facts coming within the scope of the Act from the point of view of another Statute, when the Act, itself, is self contained and contemplates that the presumption available in favour of the holder of the cheque in due course, shall be rebutted by adducing evidence, so that the facts pleaded by the drawer of a cheque could be established, as per the principles of preponderance of probabilities.

9. In the case at hand, I do not find any evidence as discussed above, to show that the presumption has been rebutted, as per the provisions of the Act.

10. Therefore, I hold that the findings of the learned Magistrate, on point No.iii, is against the law. Similarly, point No.iv, has been found against the complainant, only because point No.iii, has been found against him. In such circumstances, I set aside the findings on point Nos.iii and iv, entered by the court below and hold the said points in favour of the complainant.

11. At this stage, the learned counsel for the first respondent-accused, submitted that there are materials with him, which he may be permitted to produce before the court below and rebut the presumption and, therefore, an opportunity may be given.

12. This case has been pending as C.C.No.179/1995 on the file of Judicial Magistrate of the First Class-I, Mananthavady, since 1995. It has been transferred to Judicial Magistrate of the First Class-II, Mananthavady, and renumbered as C.C.No.276/2000. The case was disposed of and accused acquitted on 04/07/2001. After obtaining special leave, the appeal was preferred on 01/10/2001. Till now, the matter is pending.

13. The learned counsel for the appellant opposes the plea of the remand, put forward by the counsel for the accused-respondent.

14. However, considering the plea of the accused-respondent that he is in possession of the materials which could be produced before the court to rebut the presumption, I am of the view that an opportunity be given to both sides for the limited purpose of adducing rebuttable evidence by the accused-respondent, and also to adduce such evidence as may be necessary by the complainant, as well, in tune with the rebuttal evidence. Therefore, I remand the matter to the court below. I make it clear that the remand does not mean a de nova trial and the appreciation of the facts.

15. In the light of the above findings, I set aside the impugned judgment of the court below and restore C.C.No.276/2000, to the file of Judicial Magistrate of the First Class-II, Mananthavady. The parties shall appear before the court below on **13/11/2006**.

16. The learned Magistrate shall, considering the very old nature of this matter, dispose of this case, within two

months from the date of appearance of the parties, before that court. No further extension of time shall be granted. The learned Magistrate shall also post the case as expeditiously as possible, giving priority so that the matter is not dragged by either of parties.

(J.M.JAMES)
Judge

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J.M.JAMES, J.

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J U D G M E N T

9th October, 2006